

No. 94970-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Dependency of S.K.-P., a Minor Child,
WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent,

v.

S.K.-P.,

Petitioner.

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case presents an issue of first impression: whether children in dependency proceedings have a universal right to counsel under the federal and state constitutions. Given the fundamental liberty interest at stake for all the children in dependency proceedings in Washington State, this case is also one of substantial public interest.

Contrary to the position of the Department of Social and Health Services (DSHS),¹ there is no state or federal jurisprudence at the Supreme Court level that provides guidance on this issue. Rather, even as this Court has encouraged the appointment of independent legal counsel to dependent children because they are not only the “most vulnerable, but also powerless and voiceless,” it acknowledged that it “reserve[d] for another day the underlying question raised by amicus of whether the United States or Washington Constitution mandate appointment of counsel in a given circumstance.” *In re Parentage of L.B.*, 155 Wn.2d. 679, 712, 122 P.3d 161 (2005).

Children in dependencies continue to wait for a ruling by this Court about their due process rights. This case addresses that issue, and is an opportunity for this Court to provide much-needed guidance.

¹ Intervenor Pierce County filed an answer adopting by reference the legal arguments in DSHS’ Answer to Motion for Discretionary Review, filed with this Court on October 9, 2017. Intervenor Answer at 3. Petitioner’s reply therefore addresses Pierce County’s brief by reference in its reply brief to DSHS’ Answer.

II. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. S.K.-P.'S Case Involves Matters Of Continuing And Substantial Public Interest That Merit Review Despite Mootness.

A court may address a moot issue if “matters of continuing and substantial public interest are involved.” *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). The Court of Appeals applied that exact analysis and found that S.K.-P. satisfies the “exception to the mootness doctrine.” Petition for Review, Appendix C at 1-3 (declining to dismiss this appeal despite mootness because it involves “matters of continuing and substantial public interest....”) (citing *Sorenson*, 80 Wn.2d at 558). It further ruled that issues implicated in dependency proceedings “have the potential to escape review.” *Id.* at 4 (citations omitted). The Court of Appeals recognized that the issues of children’s universal right to counsel arising out of S.K.-P.’s dependency – “whether our state constitution mandates appointment of counsel” and “whether the *Mathews* test that ... applie[s] to juvenile counsel requests in *terminations* is the test that juvenile courts should use” for such requests in dependency proceedings – affect not only S.K.-P., but all children in dependency proceedings because they are legal issues. *Id.* at 3-4.

DSHS ignores the fact that this Court has consistently recognized a substantial public interest in its hearing cases concerning children in the

foster care system, even if the individual children's cases are moot. *See In re Dependency of M.S.R.*, 174 Wn.2d 1, 11, 271 P.3d 234 (2012), *as corrected* (May 8, 2012) (citations omitted) (taking up the question of right to counsel in termination proceedings, and holding that “the court may consider even moot questions when ‘it can be said that matters of continuing and substantial public interest are involved.’”); *In re Dependency of A.K.*, 162 Wn.2d 632, 643-44, 174 P.3d 11 (2007) (“Although the due process rights of juveniles are individual rights, the public has a great interest in the care of children and the workings of the foster care system.”); *In re Welfare of B.D.F.*, 126 Wn. App. 562, 570, 109 P.3d 464 (2005) (holding that review was warranted because of the implications for “every dependency filed in the state of Washington.”).

Ignoring the procedural history of this case, DSHS focuses instead on factually distinguishing the instant case from *In re Dependency of A.K.* *See Answer at 8.* However, in *A.K.*, this Court addressed findings of contempt against children running away from foster care. *A.K.*, 162 Wn.2d 632. It accepted review even though the children had served their time and aged out of the foster care system. Like the children in *A.K.*, S.K.-P. is no longer in state custody. Like in *A.K.*, S.K.-P.'s case provides this Court the opportunity to provide needed guidance about the “workings of the foster care system.” *Id.* at 643-44. The analysis and holding of *A.K.*

support review of this case despite mootness because it presents an issue of substantial public interest.

B. Whether Children In Dependency Proceedings Have A Universal Right To Counsel Under The Fourteenth Amendment Is An Issue Of First Impression That Merits Review.

This case raises a significant question of law meriting review under RAP 13.4(b)(3): whether “a significant question of law under the Constitution of the State of Washington or of the United States is involved.” S.K.-P. acknowledges that a presumption arises in favor of appointment of counsel only when physical liberty is at stake. *Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981). However, DSHS errs in its assumption that the inquiry ends there. To the contrary: when an individual’s physical liberty is not at stake, courts evaluate three elements in deciding what due process requires.² DSHS cites cursorily to *Mathews*, but provides no analysis (Answer at 12-13), ignoring S.K.-P.’s argument that a *Mathews* analysis under the Fourteenth Amendment in this context would result in appointment of counsel to all children in dependency proceedings. Petition for Review at 10-16. S.K.-P. asks this Court to apply *Mathews in the context of* the collective experience of children in dependencies, rather

² The three factors of the *Mathews* test are (1) the private interests at stake, (2) the government’s interests, and (3) the risk that the procedures used will lead to erroneous decisions. *Mathews v. Eldridge*, 424 U.S. 319, 335 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

than *individually*, regarding the individual circumstances of the child.

DSHS disregards a child's fundamental liberty interests by focusing on the physical liberty interest and then minimizing that interest by arguing that children are always in some form of custody. Answer at 13-14. DSHS's suggestion that state custody and parental custody are equivalent is unsupported by the facts of this case and contradicted by the dismal outcomes for children in foster care. "[C]hildren have no constitutional right to State intervention to protect them from their own parents," but once the state intervenes, as occurs in a dependency proceeding, such rights attach. *M.S.R.*, 174 Wn.2d at 17 (citations omitted).

DSHS erroneously suggests that a right to counsel can only exist if a child's physical liberty is at risk. Answer at 12. Children's universal right to counsel in dependency proceedings is an issue of first impression under the federal constitution, meriting review under RAP 13.4(b)(3).

**C. All Children Have Liberty Interests Implicated In
Dependency Proceedings That Are Protected By The
Washington State Constitution, A Significant Question Of
Law That Merits Review.**

This case raises a significant question of law meriting review under RAP 13.4(b)(4): whether "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." Our state constitution is more protective of individual rights than the federal

constitution because it has been interpreted to protect both physical liberty interests *and* fundamental liberty interests without the need for further inquiry. *In re Marriage of King*, 162 Wn.2d 378, 395, 174 P.3d 659 (2007); *In re Dependency of Grove*, 127 Wn.2d 221, 237, 897 P.2d 1252 (1995). *See also* Petition for Review at 8-10. This case raises significant questions of law under the state and federal constitutions, meriting review under RAP 13.4(b)(3), because it implicates due process. DSHS ignores this jurisprudence and disregards a child's fundamental liberty interests and the due process protections that should flow from those interests; it urges this Court to rely primarily on two cases: *Bellevue Sch. Dist. v. E.S.*, 171 Wn.2d 695, 257 P.3d 570 (2011) (initial truancy review hearings) and *King*, 162 Wn.2d 378 (private dissolution proceeding), to establish the relevant context. Answer at 14. However, *Bellevue* and *King* are easily distinguishable since neither involves children in foster care, and neither considers the physical, emotional, and social needs of children.

It is under the flawed premise of relying on *Bellevue* and *King* for context that DSHS argues in favor of the current case-by-case approach, asking this Court to adopt the rationale that *M.S.R.* applied to parental termination cases.³ Answer at 15-16.

³ Additionally, DSHS ignores the footnote in *M.S.R.* that explicitly states that this Court's decision applied only to terminations and not dependencies. Answer at 15-16. *M.S.R.* states in plain language that it should not "... be read to foreclose argument that a

The case-by-case approach is unworkable because all dependencies have an impact on children's liberty interests, raising constitutional issues. This Court recognized that a child has a physical liberty interest at stake in these proceedings: "It is the child, not the parent, who may face the daunting challenge of having his or her person put in the custody of the State as a foster child, powerless and voiceless, to be forced to move from one foster home to another." *M.S.R.*, 174 Wn.2d at 16. This Court also held that children have fundamental due process liberty interests at stake in dependency proceedings. *Braam ex rel. Braam v. State* 150 Wn.2d 689, 698, 81 P.3d 851 (2003) (holding that foster children in Washington "possess substantive due process rights that the State, in its exercise of executive authority, is bound to respect."). Under the state constitution, regardless of the individual circumstances of the child, all children have liberty interests at stake in their dependency proceedings that raise common legal issues.

This case-by-case rationale of *M.S.R.* should also not be extended to *S.K.-P.* given the differences between parental terminations cases and dependency cases. A termination trial determines whether a parent will lose custody of a child, while a dependency proceeding provides state oversight of a child while he or she remains in custody. Dependencies

different analysis would be appropriate during the dependency stages." 174 Wn.2d at 22 n.13.

serve “the important function of allowing state intervention in order to remedy family problems and provide needed services.” *In re Dependency of Schermer*, 161 Wn.2d 927, 942, 169 P.3d 452 (2007). A dependency court therefore has jurisdiction over issues that a termination court does not, including where a child is physically placed, who a child can visit, what services a child can receive, and whether or not that child is a ward of the state.

DSHS ignores the significant differences and purposes of dependencies and terminations. Instead it argues that terminations are more serious because there is more finality in addressing the parent-child relationship. Answer at 16. Although a termination can end the parent-child relationship, it does not implicate the myriad of liberty interests at risk in dependencies. The due process protections afforded to the liberty interests in dependency proceedings merit review under RAP 13.4(b)(3).

D. Whether The Current Procedural Safeguards Are Inadequate, As No Other Party Can Be Relied Upon To Protect A Child’s Liberty Interests In Dependency Proceedings, Raises A Significant Question Of Law That Merits Review.

The question of whether existing procedural safeguards sufficiently protect children’s legal interests raises significant questions of constitutional law that merit review under RAP 13.4(b)(3): Whether “a significant question of law under the Constitution of the State of

Washington or of the United States is involved.” There sometimes is alignment of interest between other parties involved in a dependency and the child, including the parents and the State; however, as soon as a conflict emerges between the child’s goals for the ongoing dependency proceeding and the other parties’ goals, any potential safeguard vanishes.

First, as the Court of Appeals acknowledged, parents cannot adequately mitigate the risk of harm to the child in a dependency proceeding. Petition for Review, Appendix A at 29 n.19. *See also Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1359 (N.D. Ga. 2005) (the very nature of the proceedings, which allege the parents’ unfitness to care for their children, suggests “inherent conflict of interests” between parents and children).

Second, DSHS cannot advocate for the goals of children when its first concern is avoiding liability. As the *Kenny A.* Court noted, there is “strong empirical evidence that [the State] makes erroneous decisions on a routine basis that affect the safety and welfare of foster children.” 356 F. Supp. 2d at 1361. *See also, e.g., Braam*, 150 Wn.2d 689 (lawsuit against DSHS for harm caused by years in foster care); *Tamas v. Dep’t. of Soc. & Health Servs.*, 630 F.3d 833 (9th Cir. 2010) (same).

Third, a Guardian ad Litem (GAL) cannot advocate for the child’s legal interests. Serving as the “eyes and ears” of the dependency court.

GALs are usually not attorneys, and they do not direct the course of litigation. *M.S.R.*, 174 Wn.2d at 21 (“[w]e recognize the different, important, and valuable roles of GALs, CASAs, and counsel to children in dependency and parental termination proceedings.”).

Fourth, judges, unlike attorneys, cannot conduct their own investigations; they depend entirely on others. *Kenny A.*, 356 F. Supp. 2d at 1361. Furthermore, a court cannot protect the child from harm when only the child knows his or her own goals for the dependency proceeding.

III. CONCLUSION

Whether a child in dependency proceedings has a constitutional right to counsel is an issue of first impression that raises significant questions under the state and federal constitutions, which are also of substantial public interest. S.K.-P. respectfully requests that this Court accept review pursuant to RAP 13.4(b)(3) and (4).

RESPECTFULLY SUBMITTED this 19th day of October, 2017.

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